140-701

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~1025.~~ 686 376

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

R. E. BRYAN, ADMINISTRATOR OF THE ESTATE OF DANIEL CHAPLIN, DECEASED, AND THE OREGON RAILWAY AND NAVIGATION COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

FILED JUNE 21, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1025.

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vs.

R. E. BRYAN, ADMINISTRATOR OF THE ESTATE OF DANIEL CHAPLIN, DECEASED, AND THE OREGON RAILWAY AND NAVIGATION COMPANY.

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INDEX.

	Original.	Print.
Writ of error	1	1
Copy writ of error	2	2
Proof of service of citation	3	2
Citation on writ of error	6	3
Complaint	8	4
Proof of service of summons	17	6
Summons	19	7
Stipulation extending time to answer	22	7
Stipulation extending time to answer	24	8
Answer	26	8
Reply	40	12
Motion to strike out parts of reply	52	15
Order setting motion for hearing	56	16
Order on motion	58	16
Demurrer to reply	60	17
Order allowing time to amend	63	17
Amended reply	65	18
Demurrer to amended reply	77	21
Order sustaining demurrer	80	21
Opinion of court on demurrer	82	22
Petition to make administrator defendant	98	28
Motion on petition	102	29
Order substituting administrator	104	29
Marshal's return on order	107	30
Judgment entry for defendants	109	30
Certificate of clerk	110	30

1 *Writ of error.*

In the Supreme Court of the United States.

THE UNITED STATES
vs.
R. E. BRYAN, ADMINISTRATOR OF THE ESTATE of Daniel Chaplin, deceased, and the Oregon Railway and Navigation Company. } No. 1257.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Oregon, greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before the honorable Matthew P. Deady, one of you, between the United States, plaintiff and plaintiff in error, and R. E. Bryan, administrator of the estate of Daniel Chaplin, deceased, and the Oregon Railway and Navigation Company, defendants and defendants in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, and in this behalf do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. eighteen hundred and eighty-eight, in the said Supreme Court to be then and there held; that, the record and proceedings aforesaid being then and there inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the honorable Samuel F. Miller, senior associate justice of the Supreme Court of the United States, this May 23, 1888.

[SEAL.]

R. H. LAMSON,
Clerk of the Circuit Court of the United States for the District of Oregon,
By R. B. LAMSON,
Deputy Clerk.

(Indorsed:) In the Supreme Court of the United States. The United States vs. R. E. Bryan, administrator, and the Oregon Railway and Navigation Company. Writ of error. Filed , 188 . , clerk. By , deputy clerk.

24623——1

2 *Writ of error.*

In the Supreme Court of the United States.

THE UNITED STATES
vs.
R. E. BRYAN, ADMINISTRATOR OF THE ESTATE of Daniel Chaplin, deceased, and the Oregon Railway and Navigation Company. } No. 1257.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Oregon, greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before the honorable Matthew P. Deady, one of you, between the United States, plaintiff and plaintiff in error, and R. E. Bryan, administrator of the estate of Daniel Chaplin, deceased, and the Oregon Railway and Navigation Company, defendants and defendants in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, and in this behalf do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. eighteen hundred and eighty-eight, in the said Supreme Court to be then and there held; that, the record and proceedings aforesaid being then and there inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the honorable Samuel F. Miller, senior associate justice of the Supreme Court of the United States, this May 23, 1888.

[Seal of U. S. circuit court.] R. H. LAMSON,
Clerk of the Circuit Court of the United States for the District of Oregon,
By R. B. LAMSON,
Deputy Clerk.

(Indorsed:) In the Supreme Court of the United States. The United States vs. R. E. Bryan, administrator, et al. Copy. Writ of error. Filed , 188 . , clerk. By , deputy clerk.

3 DISTRICT OF OREGON, *ss:*

I certify that on the 31st day of May, 1888, at Portland, Multnomah County, in said district, I duly served the within citation on writ of error upon the therein-named defendant, the Oregon Railway and Navigation

Company, by delivering to S. B. Willey, secretary of said defendant, personally, a true copy of said citation on writ of error, duly certified to by me as U. S. marshal.

JOHN MYERS,
U. S. Marshal,
By W. W. ROBERTS,
Deputy.

4 DISTRICT OF OREGON, *ss:*

I certify that on the 23 day of May, 1888, at Portland, Multnomah County, in said district, I duly served the within citation on writ of error upon the therein-named defendant, the Oregon Railway and Navigation Company, by delivering to W. H. Holcomb, general manager of said defendant, personally, a true copy of said citation on writ of error, duly certified to by me as U. S. marshal.

JOHN MYERS,
U. S. Marshal,
By H. C. MYERS,
Deputy.

5 DISTRICT OF OREGON, *ss:*
District of Oregon, ss:

I certify that on the 30th day of May, 1888, at La Grande, Union Co., in said district, I duly served the within citation on writ of error upon the therein-named defendant, R. E. Bryan, administrator of the estate of Daniel Chaplin, deceased, by delivering to R. E. Bryan, personally, a true copy of said citation on writ of error, duly certified to by me as U. S. marshal.

JOHN MYERS,
U. S. Marshal,
By CHAS. N. WAIT,
Deputy.

6 UNITED STATES OF AMERICA,
District of Oregon, ss:

To R. E. Bryan, administrator of the estate of Daniel Chaplin, deceased, and the Oregon Railway and Navigation Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday in October, A. D. eighteen hundred and eighty-eight, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Oregon, wherein the United States is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said district, this May 23, 1888.

MATTHEW P. DEADY,
U. S. District Judge, Oregon.

(Indorsed:) No. 1257. U. S. circuit court, district of Oregon. The United States, pl'ff, *vs.* R. E. Bryan, administrator of the estate of Daniel Chaplin, deceased, and the Oregon Railway and Navigation Company, def'ts. Citation on writ of error. Filed May 31, 1888. R. H. Lamson, clerk.

7 In the circuit court of the United States for the district of Oregon, April term, 1886.

Be it remembered, that on the 14th day of July, 1886, there was duly filed in the circuit court of the United States for the district of Oregon, a complaint in words and figures as follows, to wit:

8 In the circuit court of the United States for the district of Oregon.

Complaint.

THE UNITED STATES, PL'FF,
vs.
DANIEL CHAPLIN AND THE OREGON RAILWAY AND NAVIGATION COMPANY, DEF'TS.

Comes the plaintiff above named, by Lewis L. McArthur, United States attorney for the district of Oregon, and, complaining of the above-named defendants, alleges the following facts, which constitute its cause of action:

That the defendant Daniel Chaplin is a citizen of the United States and a resident of the district of Oregon.

That the defendant The Oregon Railway and Navigation Company was at all the times hereinafter stated, and now is, a private incorporation, duly incorporated under the laws of the State of Oregon, and having its principal office and place of business at the city of Portland, in the State and district of Oregon.

9 That on the 18th day of December, A. D. 1880, and at divers other days and times between said day and the 1st day of December, A. D. 1885, the above-named defendant Daniel Chaplin unlawfully, wilfully, and without the consent or license of the plaintiff, entered upon the "northeast quarter of the southeast quarter of section twenty-one, and the north half of the south half of section twenty-two, and the north half of the southwest quarter, and the southeast quarter of the northwest quarter of section twenty-three, all in township three, north range thirty-six east of the Willamette meridian; and upon the east half of section nineteen and the east half of section thirty, township two, north range thirty-six east of the Willamette meridian; and upon the northwest quarter of the northwest quarter, and the east half of the northwest quarter, and the southwest quarter of the northeast quarter, and the southeast quarter of section five, and the northeast quarter of the north-
10 east quarter of section eight, and the northwest quarter of the northwest quarter, and the southwest quarter of the northwest quarter, and the northwest quarter of the southwest quarter, and the east half of the southwest quarter of section nine, all in township one, north of range thirty-six east of the Willamette meridian; and upon the south half of the northwest quarter, and the southwest quarter of the northeast

quarter, and the southeast quarter of the northeast quarter, and the northeast quarter of the southwest quarter, and the west half of the southeast quarter, and the east half of the southeast quarter of section twenty-seven, all in township one, north of range thirty-six east of the Willamette meridian; and upon sections thirty-four and thirty-five, in township one, north of range thirty-five east of the Willamette meridian; and upon
11 the northwest quarter and the north half of the southwest quarter, and the southeast quarter of the southwest quarter of section two, and the east half of the northwest quarter, and the east half of the southwest quarter of section eleven, and the west half of the east half of section two, and the west half of the east half of section eleven, and the northwest quarter of the northeast quarter of section fourteen, and the north half of the northwest quarter of section fourteen, and the southwest quarter of the southwest quarter of section two, and the west half of the northwest quarter, and the northwest quarter of the southwest quarter of section eleven, all in township one, south of range thirty-five east of the Willamette meridian; and upon the northwest quarter, and the west half of the northeast quarter, and the west half of the southeast quarter of section thirty, and the southwest quarter of section nineteen, in township two, south of range thirty-seven east of the Willamette
12 meridian; and upon section twenty-four and the north half of the north half of section twenty-five in township two, south of range thirty-six east of the Willamette meridian; and upon the southwest quarter of section thirty in township two, south of range thirty-seven east of the Willamette meridian; all of said lands lying and being in the State and district of Oregon, and being public lands of the United States of America and the said defendant Daniel Chaplin did then and there, unlawfully and wrongfully, and with intent to dispose of the same, cut and remove from said lands, and cause and procure to be cut and removed therefrom, a large amount, to wit, seven million eight hundred and six thousand and two hundred feet of timber, then and there being and growing on said lands, and did then and there cut and manufacture said timber so cut and removed as aforesaid, then and there
13 being the property of this plaintiff, into saw logs, then and there of the value of two and $\frac{50}{100}$ dollars per thousand feet, and of the aggregate value of seventeen thousand five hundred and fifteen and $\frac{25}{100}$ dollars.

That the said defendant Daniel Chaplin did, between the dates last aforesaid, transport and remove and cause to be transported and removed all of said saw-logs so unlawfully cut as aforesaid, to divers saw mills owned and operated by him, some of which were situate upon the lands herein above described and others upon the lands adjacent thereunto, and well knowing that said saw-logs were the property of this plaintiff as aforesaid, did then and there cut, saw, and manufacture all of said saw-logs into boards and other lumber, then and there of the value of fifteen dollars per thousand feet and of the aggregate value of one hundred and seventeen thousand and ninety-three dollars.

That the said defendant The Oregon Railway and Navigation
14 Company, well knowing that the said boards and other lumber were the property of this plaintiff, and had been cut, sawed, and manufactured from timber unlawfully and wrongfully cut and removed

from the lands of this plaintiff as aforesaid, did at divers times between the dates aforesaid, and at divers places within the district aforesaid, wrongfully take possession of all of said seven million eight hundred and six thousand and two hundred feet of boards and other lumber, then and there being the property of this plaintiff, and then and there being of the value of one hundred and seventeen thousand and ninety-three dollars, and did then and there wrongfully and unlawfully convert said seven million eight hundred and six thousand and two hundred feet of boards and other lumber, then and there being the property of this plaintiff, to its own use, to the damage of the plaintiff in the sum of one hundred and seventeen thousand and ninety-three dollars.

15 Wherefore the plaintiff prays judgment against the defendants for the full sum of one hundred and seventeen thousand and ninety-three dollars, together with the costs and disbursements of this action.

LEWIS L. MCARTHUR,
United States Attorney for the Dist. of Oregon.

DISTRICT OF OREGON, *ss:*

I, Lewis L. McArthur, United States attorney for the district of Oregon, being sworn, upon my oath say that the foregoing complaint is true, as I verily believe.

LEWIS L. MCARTHUR.

Subscribed and sworn to before me this July 14, 1886.

R. H. LAMSON,
Clerk.

(Endorsed:) Filed July 14, 1886. R. H. Lamson, Clerk.

16 And afterwards, to wit, on the 14th day of July, 1886, there was issued out of said court a summons in words and figures as follows, to wit:

17 DISTRICT OF OREGON, *ss:*

I certify that on the 17th day of July, 1886, at La Grande, Union County, in said district, I duly served the within summons upon the therein named Daniel Chaplin, by exhibiting said writ to him, and by delivering to him personally a true copy of said summons, duly certified to by me as U. S. marshal, together with a copy of the complaint in the within entitled suit, duly certified to by the clerk of the circuit court for said district.

PENUMBRA KELLY,
United States Marshal.
By CHARLES W. FRUSH,
Deputy.

18 DISTRICT OF OREGON, *ss:*

I certify that on the 14th day of July, 1886, at Portland, Multnomah County, in said district, I duly served the within summons upon the therein named corporate defendant "The Oregon Railway and Navigation Company," by exhibiting said writ to T. Wygant, the secretary of said O. R. and N. Co., and by delivering to him personally a true copy of said summons, duly certified to by me as U. S. marshal, together with a copy

of the complaint in the within entitled suit, certified to by the clerk of the U. S. circuit court for said district.

PENUMBRA KELLY,
United States Marshal.
By CHARLES W. FRUSH,
Deputy.

19 In the circuit court of the United States for the ninth judicial circuit, district of Oregon.

Summons.

THE UNITED STATES,
vs.
DANIEL CHAPLIN AND THE OREGON RAILWAY and Navigation Company. } No. 1257.

The President of the United States to Daniel Chaplin and The Oregon Railway and Navigation Company, the above-named defendants. Greeting:

You are hereby commanded to be and appear in the above-entitled court, holden at Portland, in said district, and answer the complaint filed against you in the above-entitled action within ten days from the date of the service of this summons upon you, if served within the county of Multnomah, in said district, or if served within any other county of said district then within thirty days from the date of such service upon you; and if you fail so to appear and answer, for want thereof the plaintiff will take judgment against you for the sum of $117,093.00 and the costs and disbursements of this action.

20 And this is to command you, the marshal of said district, or your deputy, to make due service and return of this summons. Hereof fail not.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and the seal of said circuit court, affixed at Portland, in said district, this 14th day of July, 1886.

[SEAL OF U. S. CIRCUIT COURT, OREGON.] R. H. LAMSON,
Clerk.

(Indorsed:) No. 1257. In the circuit court of the United States for the district of Oregon. The United States *vs.* Daniel Chaplin and The O. R. & N. C. Summons.

(Endorsed:) Returned and filed July 20, 1886. R. H. Lamson, clerk.

21 And afterwards, to wit, on the 17th day of July, 1886, there was duly filed in said court stipulation extending time to answer in words and figures as follows, to wit:

22 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES, PLAINTIFF,
vs.
DANIEL CHAPLIN AND THE OREGON RAILWAY and Navigation Company, defendants.

It is hereby stipulated and agreed that the defendant the Oregon Rail-

way and Navigation Company may have until August 3d, 1886, in which to answer the complaint on file in this action.

L. L. McARTHUR,
Attorney for Plaintiff.
DOLPH, BELLINGER, MALLORY, AND SIMON,
Attorneys for Defendant Oregon Railway and Navigation Co.

(Endorsed:) Filed July 17, 1886. R. H. Lamson, clerk.

23 And afterwards, to wit, on the 30th day of July, 1886, there was duly filed in said court a stipulation extending time to answer in words and figures as follows, to wit:

24 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES, PLAINTIFF,
vs.
DANIEL CHAPLIN AND THE OREGON RAILWAY and Navigation Company, defendants.

It is hereby stipulated that the defendants may have until September 1, 1886, in which to answer the complaint in the above-entitled action.

L. L. McARTHUR,
Attorney for Plaintiff.
DOLPH, BELLINGER, MALLORY, AND SIMON,
Attorneys for Defendants.

(Endorsed:) Filed July 30, 1886. R. H. Lamson, clerk.

25 And afterwards, to wit, on the 17th day of August, 1886, there was duly filed in said court an answer in words and figures as follows, to wit:

26 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES, PLAINTIFF,
vs.
DANIEL CHAPLIN AND THE OREGON RAILWAY and Navigation Company, defendants.

And now come the defendants above named and, answering the plaintiff's complaint herein,

Admit that the defendant the Oregon Railway and Navigation Company is a private corporation, duly incorporated under the laws of the State of Oregon.

Defendants deny that on the 18th day of December, A. D. 1880, or at divers or any other days or times between said day and the 1st day of December, A. D. 1885, or at all, the defendant Daniel Chaplin unlawfully, wilfully, or without the consent or license of the plaintiff, or otherwise at all—except as hereinafter specially alleged—entered upon the northeast quarter of the southeast quarter of section twenty-
27 one, or the north half of the south half of section twenty-two, or the north half of the southwest quarter, or the southeast quarter of the

northwest quarter of section twenty-three, in township three north, range thirty-six, east of the Willamette meridian, or upon the east half of section nineteen, or the east half of section thirty, township two north range thirty-six east, of the Willamette meridian, or upon the northwest quarter of the northwest quarter, or the east half of the northwest quarter and the southwest quarter of the northeast quarter, or the southeast quarter of section five, or the northeast quarter of the northeast quarter of section eight, or the northwest quarter of the northwest quarter, or the southwest quarter of the northwest quarter, or the northwest quarter of the southwest, or the east half of the southwest quarter of section nine, in township one north, of range thirty-six east, of the Willamette meri-
28 dian, or upon the south half of the northwest quarter, or the southwest quarter of the northeast quarter, or the southeast quarter of the northeast quarter, or the northeast quarter of the southwest quarter, or the west half of the southeast quarter, or the east half of the southeast quarter of section twenty-seven, in township one north, of range thirty-six east, of the Willamette meridian, or upon sections thirty-four or thirty-five, in township one north, of range thirty-five east, of the Willamette meridian, or upon the northwest quarter or the north half of the southwest quarter, or the southeast quarter of the southwest quarter of section two, or the east half of the northwest quarter, or the east half of the southwest quarter of section eleven, or the west half of the east half of section two, or the west half of the east half of section eleven, or the northwest quarter of the southwest quarter of section eleven,
29 or the northwest quarter of the northeast quarter of section fourteen, or the north half of the northwest quarter of section fourteen, or the southwest quarter of the southwest quarter of section two, or the west half of the northwest quarter, or the northwest quarter of the southwest quarter of section eleven, in township one south, of range thirty-five east, of the Willamette meridian, or upon the northwest quarter, or the west half of the northeast quarter, or the west half of the southeast quarter of section thirty, or the southwest quarter of section nineteen, in township two south, of range thirty-seven east, of the Willamette meridian, or upon section twenty-four, or the north half of the north half of section twenty-five in township two south, of range thirty-six east, of the Willamette meridian, or upon the southwest quarter of section thirty, in township two south, of range thirty-seven east, of the Willamette meridian,
30 or any part or parcel thereof, or upon any lands in the complaint described.

Deny that all said lands are or were at any times in said complaint mentioned public lands of the United States, and as to whether any part of said lands are public lands of the United States these defendants have no knowledge or information sufficient to form a belief.

Deny that the defendant Daniel Chaplin then or there or ever unlawfully or wrongfully, or with intent to dispose of the same or otherwise, except as hereinafter stated, either cut or removed from said lands, or cut or caused to be cut or removed therefrom, or from any lands in the complaint described, a large or any amount, either seven million eight hundred and six thousand two hundred feet of timber, or any other number of feet of timber, or did then or there cut or manufacture said or any timber so cut or removed, then or there being the property of the plaint-

iff, either of the value of two and one-half dollars per thousand
31 feet or of the aggregate value of seventeen thousand five hundred and fifteen and $\frac{25}{100}$ dollars, or any value or otherwise.

Deny that said defendant Daniel Chaplin did transport or remove all or any of said saw-logs, well or at all knowing that said saw-logs were the property of the plaintiff or otherwise, or did manufacture said saw-logs into boards and other lumber either then or there of the value of fifteen dollars per thousand feet, or of the aggregate value of one hundred and seventeen thousand and ninety dollars or any other sum or otherwise.

Deny that the defendant The Oregon Railway and Navigation Company well or at all knowing that said boards or other lumber were the property of the plaintiff, or had been cut, sawed, or manufactured from timber unlawfully, wrongfully, or otherwise cut or removed from the lands of the plaintiff, did at divers times, or at all within the district afore-
32 said or elsewhere, wrongfully or otherwise take possession of all or any of said seven millions eight hundred and six thousand two hundred feet of boards or other lumber either then or there being the property of plaintiff, of the value of one hundred and seventeen thousand and ninety-three dollars, or any sum or otherwise; and

Deny that said defendant did then or there or otherwise wrongfully or unlawfully or otherwise convert the seven millions eight hundred and six thousand two hundred feet of boards or other timber, or any boards or other timber then or there the property of the plaintiff to its own use, either to the damage of the plaintiff in any sum whatever or otherwise.

Defendants further answering and for a separate defense herein, allege:

That the defendant The Oregon Railway and Navigation Company is a corporation, duly organized and existing under the laws of the State of Oregon, for the purpose, among other things, of constructing, main-
33 taining, and operating a railroad and telegraph line from the town of Umatilla, in Umatilla County, in the State of Oregon, across the Blue Mountains, through the Grande Ronde Valley in a southeasterly direction to a point on the east boundary line of the State of Oregon.

That in and by an act of the Congress of the United States approved March 3d, 1875, there was and is granted to said defendant The Oregon Railway and Navigation Company the right to take from the public lands adjacent to the line of its said road all material, earth, stone, and timber necessary for the construction of its said railroad.

That the railroad of the said defendant between the towns of Pendleton, in Umatilla County, and the southern boundary of the State of Oregon, was located through and over townships one (1), two (2), and three (3) north of range thirty-six (36) east, one (1) north of range thirty-
34 five (35) east, township one (1) south of range thirty-five (35) east, and township two (2) south of range thirty-six (36) east, and No. two (2) south of range thirty-seven (37) east, between the 15th day of September, A. D. 1880, and June 20th, 1881, and all said railway was fully completed and constructed on or about the 25th day of November, 1884.

That within one year after such location thereof a profile map and plat of each section of twenty miles of said railroad was duly made, filed, and approved by the Secretary of the Department of the Interior of the United States in all respects as in said act provided.

That said defendant The Oregon Railway and Navigation Company

being so entitled and authorized to take materials, earth, stone, and timber from the public lands adjacent to its said line of railroad necessary for the construction thereof, and having first in all things duly complied with the provisions of the act of Congress aforesaid, did contract with and
35 employ the said Daniel Chaplin to cut from the public lands adjacent to its said line of railroad certain railroad ties, timber, and lumber to be used in the construction of its said railroad.

That in pursuance of said employment, and not otherwise, the said defendant Daniel Chaplin, did cut or cause to be cut from said adjacent public lands, timber and railroad ties to the amount in quantity of not exceeding three million feet, and in value not exceeding fifty cents per thousand feet, and not exceeding in the aggregate the sum of fifteen hundred dollars, which said ties and lumber were so cut to be used in the construction of said railroad, and the same and every part thereof was necessary for the construction of said railroad, and was actually used therein and is the same timber, saw-logs, and other lumber referred to in plaintiff's complaint herein, and to recover for which this action is brought; and these defendants aver that he, the said Daniel Chaplin, did
36 neither cut nor remove, and that the defendant The Oregon Railway and Navigation Company, did never receive from said defendant Daniel Chaplin nor convert to its own use, any timber, logs, or lumber taken from public lands of the United States except as aforesaid.

And these defendants, for a further defense, herein aver that the defendant, Daniel Chaplin, did, under his said employment as hereinbefore alleged, cut and remove all said ties, timber, and lumber from the public lands as herein stated and alleged in good faith, and in the honest belief that under the provisions of the act of Congress aforesaid, he might lawfully so cut, remove the same, and deliver the same to said defendant The Oregon Railway and Navigation Company for the purpose of constructing said railroad, and that the same and ever part and parcel of said railroad ties, timber, and lumber so as aforesaid cut or removed from
37 said public lands and delivered to or received by the defendant the said The Oregon Railway and Navigation Company or appropriated to its use, was so received by it, and used in the construction of its said railroad in good faith and in the honest belief that the said company might lawfully take and appropriate the same in the construction of its said railroad under the provisions of the act of Congress above set forth.

Wherefore defendants pray judgment for their costs and disbursements.

DOLPH, BELLINGER, MALLORY & SIMON,
Defendants' Attorneys.

STATE OF OREGON,
Multnomah County, ss:

I, Daniel Chaplin, being first duly sworn, say I am one of the defendants named in the foregoing answer, and that said answer is true, as I verily believe.

DANIEL CHAPLIN.

Subscribed and sworn to before me this 17th day of August, A. D. 1886.

[SEAL.]

V. C. BELLINGER,
Notary Public for Oregon.

38 STATE OF OREGON,
County of Multnomah, ss:

Due service of the within answer is hereby accepted, at Portland, Oregon, this 17 day of August, 1886, by receiving a copy thereof, duly certified to as such by C. A. Dolph, counsel for def'ts.

L. L. MCARTHUR,
Attorney for Pl'ff.

(Endorsed:) Filed Aug. 17, 1886. R. H. Lamson, clerk.

39 And afterwards, to wit, on the 21st day of September, 1886, there was duly filed in said court a reply in words and figures as follows, to wit:

40 In the circuit court of the United States for the district of Oregon.

Reply.

THE UNITED STATES
vs.
DANIEL CHAPLIN AND THE OREGON RAILway and Navigation Company.

Comes now the plaintiff, by its attorney, and for reply to the answer of the defendants, denies, avers, and alleges as follows:

Denies that in and by the act of the Congress of the United States referred to in the answer, or by any act of Congress, there was or is granted to the defendant The Oregon Railway and Navigation Company the right to take from the public lands adjacent to the line of its road, or elsewhere, all or any material or earth or stone or timber necessary, in any degree whatsoever, for the construction of its railroad.

Denies that the said defendant The Oregon Railway and Navigation Company was ever at any time entitled or authorized to take tim-
41 ber from the public lands adjacent to its alleged line or railroad necessary, in any degree, for the construction thereof or any part thereof.

Denies that the said Oregon Railway and Navigation Company did, in all things or in anything, duly or otherwise, comply with the provisions of the act of the Congress of the United States referred to in the answer.

Admits that the said Oregon Railway and Navigation Company did contract with and employ the said Daniel Chaplin to cut from the public lands adjacent to its line of railroad certain railroad ties, timber, and lumber, to be used in the construction of its said railroad, but avers that the said contract and employment was without authority of law and was in the manner and form in which said contract was made and said employment given wholly in disregard and violation of the rules and regulations in such behalf duly established and promulgated by the Secretary of
42 the Department of the Interior of the United States, hereinafter pleaded.

Denies that in pursuance of the alleged employment by the Oregon Railway and Navigation Company of the said Daniel Chaplin, he, the said Daniel Chaplin, did cut, or caused to be cut, from the said adjacent lands timber and railroad ties to the amount in quantity of only three million feet, or that the amount of timber cut by him from the public

lands adjacent to the line of said railroad and taken by the said Oregon Railway and Navigation Company and used and disposed of by it, was any less or other quantity than seven million eight hundred and six thousand two hundred feet board measure, as in the complaint alleged, and denies that the value thereof or of the quantity cut and delivered by him as aforesaid did not exceed fifty cents per thousand feet, or the aggregate sum of fifteen hundred dollars, or was of any less or other value
43 than fifteen dollars per thousand feet, board measure, or in the aggregate any less or other value than one hundred and seventeen thousand and ninety-three dollars, as in the complaint alleged.

The plaintiff denies any knowledge or information sufficient to form a belief as to whether the timber or any part thereof admitted by the defendants in their answer to have been cut from the public lands of the plaintiff was necessary for the construction of said railroad or any part thereof, or as to whether the same or any part thereof was actually used therein.

Denies that the defendant, Daniel Chaplin, did neither cut nor remove, and that the defendant, the Oregon Railway and Navigation Company, did not receive from said Daniel Chaplin or convert to its own use, any timber or logs, or other lumber taken from the public lands of the United States, except as in the answer admitted, but avers as in the complaint.

44 Denies that the said Daniel Chaplin did, under his alleged employment, cut or remove all or any part of the alleged ties, timber, or lumber from the public lands, as stated in said answer, in good faith or in the honest belief that under the provisions of the act of Congress aforesaid, or any act of Congress, he might lawfully or at all cut or remove the same or deliver the same to the defendant, the Oregon Railway and Navigation Company, for the purpose of constructing its railroad, or for any purpose, and denies that the same or any part or parcel of said ties, timber, or lumber was received by the said Oregon Railway and Navigation Company, or used in the construction of its alleged railroad in good faith or in the honest belief that the said company might lawfully take or appropriate the same or any part thereof for the construction of its railroad or
45 any or for any purpose under the provisions of the act of Congress, alleged or otherwise.

And, further replying, the plaintiff alleges that on the 19th day of July, A. D. 1881, the honorable Commissioner of the General Land Office, with the official approval of the honorable Secretary of the Department of the Interior of the United States, did establish and promulgate divers rules and regulations, in order to properly and methodically carry out the provisions of the act of Congress approved March 3rd, 1875, granting the right of way through the public lands of the United States, among which said rules and regulations were, and are, the following: "The right under this act to take material from the public lands for the construction of railroads is granted to railroad companies organized according to the provisions of this act, and to no other parties. Railroad companies have no power to give general authority to the public to cut timber from the public
46 lands, nor has Congress ever given such authority to the public. Individuals controlled and directed by a railroad company, or by the contractors of such company for building its road, and for whose acts the company is and can be held responsible, will be deemed the agents of the company within the meaning of this act. But individuals cutting timber

from the public lands and selling the same to a railroad company at an agreed price are not agents of the company. In such a case the railroad company would have no authority to direct the place where, or the manner in which, the timber should be taken, nor any control whatever over the individuals cutting the timber; nor could it be held in any way responsible for the conduct of such individuals. Only those persons, therefore, who are the direct duly authorized agents of a railroad company can represent the company in the exercise of the rights granted to such
47 company under this act (the act aforesaid).

"Persons who merely contract to cut and deliver to a railroad company ties or other timber at certain rates per tie or quantity, and for whose acts the company is not responsible, have no authority to take timber from the public lands even for delivery to a railroad company authorized to take such timber by its proper agents; such unauthorized persons will be deemed trespassers on the public lands, and must be proceeded against accordingly. In all instances wherein a railroad company desires to take large quantities of earth, stone, or timber, under the provisions of this act, from any one particular spot or vicinity, the proper officer or duly authorized representative of said company must make application in writing to the Commissioner of the General Land Office, through the register and receiver of the proper land district, specifying under
48 oath the kind of material required, the purpose for which it is desired, the probable amount or quantity needed, and designating the public lands from which the material is to be taken, describing the lands, if surveyed, by section, township, and range; or, if unsurveyed, indicating their locality by some well-known point."

That the defendant, Daniel Chaplin, was not at any time either a member or officer of the Oregon Railway and Navigation Company; that under his alleged contract and employment he was not and was not to be in any degree whatsoever controlled or directed by the said railroad company, or by any contractor of said company for building its road, or by any one for whose acts the said company could be held responsible.

That the said Daniel Chaplin was not an authorized agent of the said Oregon Railway and Navigation Company, but was simply a per-
49 son who merely contracted to cut and deliver to the said railroad company ties and other timber and lumber at certain rates per tie or quantity.

That neither the said railroad company nor any of its officers nor the said Daniel Chaplin ever, at any time, made application in writing or otherwise to the honorable Commissioner of the General Land Office, through the register and receiver of any United States land district whatsoever, specifying under oath or otherwise the kind of material required, the purpose for which it was desired, the probable amount or quantity needed, and designating the public lands from which the material was to be taken.

That all of said rules and regulations were and are reasonable, and were promulgated before the said Chaplin entered upon the discharge of his alleged contract and employment, and that the said Chaplin had actual notice thereof.

50 Wherefore the plaintiff prays as in the complaint.

LEWIS L. MCARTHUR,
United States Attorney.

DISTRICT OF OREGON, *ss:*

I, Lewis L. McArthur, being sworn, upon oath say that the foregoing reply is true, as I verily believe.

LEWIS L. MCARTHUR.

Subscribed and sworn to before me this Sept. 21, 1886.

R. H. LAMSON,
Clerk.

COUNTY OF MULTNOMAH, *ss:*

I, , one of the attorneys for the defendants, hereby acknowledge due service of certified copy of the foregoing reply upon me, at Portland, Oregon, on the 21st day of Sept., A. D. 1886.

DOLPH, BELLINGER, MALLORY & SIMON,
Attorneys for Defendants.

(Endorsed:) Filed Sept. 21, 1886.

R. H. LAMSON,
Clerk.

51 And afterwards, to wit, on the 21st day of September, 1886, there was duly filed in said court a motion to strike out parts of reply in words and figures as follows, to wit:

52 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES, PLAINTIFF,
vs.
DANIEL CHAPLIN AND THE OREGON RAILWAY and Navigation Company, defendants.

And now come the defendants above named and move the court to strike out of plaintiff's reply herein the following parts thereof:

First. Commencing with the word "denies" in the 12th line of the first page of said reply and up to and including the word "railroad" in the 19th line thereof, for the reason and upon the ground that the same is sham.

Second. Commencing with the word "denies" in the 20th line of the first page of said reply and up to and including the word "thereof" in the next to the last line of said first page of said reply, for the reason and upon the ground that the same is sham.

53 Third. Commencing with the word "admits" in the fifth line of the second page of said reply and up to and including the word "pleaded" in the 18th line of the same page thereof, for the reason and upon the ground that the same is sham, irrelevant, and immaterial.

Fourth. Commencing with the word "and" in the 18th line of the fourth page of said reply and up to and including the word "point" in the 19th line of the sixth page thereof, for the reason and upon the grounds that the same is irrelevant and immaterial.

Fifth. Commencing with the word "That" in the 20th line of said sixth page of said reply and up to and including the word "responsible" in the last line of said sixth page, for the reason that the same is sham, irrelevant, and immaterial.

Sixth. Commencing with the word "That" in the first line of the 7th page of said reply and up to and including the word "quantity"

54 in the 6th line of the said seventh page thereof, for the reason and upon the ground that the same is sham and immaterial.

Seventh. Commencing with the word "that" in the 7th line of said 7th page of said reply and up to and including the word "taken" in the 16th line of the same page thereof, for the reason that the same is immaterial.

Eighth. Commencing with the word "that" in the 17th line of the 7th page of said reply and up to and including the word "thereof" in the 21st line of the same page thereof, for the reason that the same is immaterial.

DOLPH, BELLINGER, MALLORY & SIMON,
Defts' Att'ys.

STATE OF OREGON,
County of Multnomah, ss.:

Due service of the within motion to strike out is hereby accepted at Portland, Oregon, this 21st day of September, 1886, by receiving a copy thereof duly certified to as such by C. A. Dolph, counsel for defendants.

L. L. MCARTHUR,
Attorney for plaintiff.

(Endorsed:) Filed Sept. 21, 1886. R. H. Lamson, Clerk.

55 And afterwards, to wit, on Wednesday, the 22d day of December, 1886, the same being the 58th judicial day of the regular October term of said court; present: the honorable Matthew P. Deady, United States district judge, presiding, the following proceedings were had in said case, to wit:

56 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES *vs.* DANIEL CHAPLIN AND THE OREGON RAILway and Navigation Company.	No. 1257. December 22, 1886.

Now at this day comes the plaintiff in the above-entitled cause, by Mr. Lewis L. McArthur, United States attorney, and the defendants, by Mr. Cyrus A. Dolph, of counsel, and on motion of said plaintiff it is ordered that this cause be, and the same is hereby, set for hearing on the motion to strike out parts of the reply on Wednesday, January 12, 1887.

57 And afterwards, to wit, on Wednesday, the 19th day of January, 1887, the same being the 71st judicial day of the regular October term of said court; present, the honorable Matthew P. Deady, United States district judge, presiding, the following proceedings were had in said case, to wit:

58 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES *vs.* DANIEL CHAPLIN AND THE OREGON RAILway and Navigation Company.	No. 1257. January 19, 1887.

This cause was heard upon the motion to strike out parts of the reply and was argued by Mr. C. A. Dolph, of counsel for the defendants, and

by Mr. Lewis L. McArthur, United States attorney. On consideration whereof it is ordered that said motion be, and the same is hereby, allowed as to the first three denials of said reply and denied as to the remainder.

59 And afterwards, to wit, on the 20th day of January, 1887, there was duly filed in said court a demurrer to reply in words and figures as follows, to wit:

60 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES, PLAINTIFF,
vs.
DANIEL CHAPLIN AND THE OREGON RAILWAY and Navigation Company, defendants.

And now come the defendants above named, and demur to the new matter contained in the plaintiff's reply herein filed, being that portion of plaintiff's reply commencing with the words "and further replying," in the 15th line of the 6th page of said reply and up to and including the word "thereof," immediately preceding the prayer of said reply, for the reason and upon the ground that it appears upon the face thereof that the matter therein contained is not a sufficient reply to the facts stated in the answer of the defendants filed herein.

DOLPH, BELLINGER, MALLORY & SIMON,
Attorneys for Defendants.

61 DISTRICT OF OREGON, *ss:*

Service of the foregoing demurrer is hereby accepted this 20th day of January, 1887, by receiving a copy thereof certified to by C. A. Dolph, one of defendant's attorneys.

L. L. MCAUTHUR,
U. S. Att'y.

(Endorsed:) Filed Jan. 20, 1887. R. H. Lamson, clerk.

62 And afterwards, to wit, on Wednesday, the 23d day of February, 1887, the same being the 86th judicial day of the regular October term of said court; present, the honorable Matthew P. Deady, United States district judge, presiding, the following proceedings were had in said case, to wit:

63 [86, Wed.

In the circuit court of the United States for the district of Oregon.

THE UNITED STATES
vs.
DANIEL CHAPLIN ET AL. } No. 1257, February 23, 1887.

Now at this day comes the plaintiff by Mr. Lewis L. McAuthur, United States attorney, and the defendants by Mr. C. A. Dolph, of coun-

sel, and on motion of said plaintiff, it is Ordered, that it be, and it is hereby, allowed to file an amended reply in this cause within ten days herefrom.

64 And afterwards, to wit, on the 19th day of April, 1887, there was duly filed in said court an amended reply in words and figures as follows, to wit:

65 In the circuit court of the United States for the district of Oregon.

Amended reply.

THE UNITED STATES
vs.
DANIEL CHAPLIN AND THE OREGON RAILWAY and Navigation Company.

Comes now the plaintiff, by its attorney, and for amended reply to the answer of the defendants, denies, avers, and alleges as follows:

Denies that the said Oregon Railway and Navigation Company did in all things, or in anything, duly or otherwise, comply with the provisions of the act of Congress of the United States referred to in the answer.

Denies that, in pursuance of the alleged employment by the Oregon Railway and Navigation Company of the said Daniel Chaplin, he, the said Daniel Chaplin, did cut, or cause to be cut, from the said ad-

66 jacent lands timber and railroad ties to the amount of only three million feet, or that the amount of timber cut by him from the public lands adjacent to the line of said railroad, or taken by thesaid Oregon Railway and Navigation Company and used or disposed of by it, was any less or other quantity than seven millions eight hundred and six thousand two hundred feet, board measure; and denies that the value thereof, or of the quantity cut and delivered by him, as alleged in the answer, did not exceed fifty cents per thousand feet, or the aggregate sum of fifteen hundred dollars, or was of any less or other value than fifteen dollars per thousand feet, board measure, or in the aggregate of any less or other value than one hundred and seventeen thousand and ninety-three dollars.

Denies that the defendant Daniel Chaplin did neither cut nor re-

67 move, or that the defendant The Oregon Railway and Navigation Company did not receive from said Daniel Chaplin or convert to its own use any timber, or logs, or lumber cut or taken from the public lands of the United States except as in the answer admitted.

Denies that the said Daniel Chaplin did, under his alleged employment, cut or remove all or any part of the alleged ties, timber, or lumber from the public lands, as stated in said answer in good faith, or in the honest belief that, under the provisions of the act of Congress in the answer referred to or any act of Congress, he might lawfully or at all, cut or remove the same, or deliver the same to the defendant The Oregon Railway and Navigation Company for the purpose of constructing its railroad or for any purpose; and denies that the same, or any part or parcel of said ties, timber, or lumber, was received by said Oregon Railway

68 and Navigation Company, or used in the construction of its alleged railroad in good faith, or in the honest belief that the

said company might lawfully take or appropriate the same, or any part thereof, for the construction of its railroad, or for any purpose, under the provisions of the act of Congress referred to in the answer or otherwise.

And for a further reply the plaintiff alleges that on the 19th day of July, A. D. 1881, the honorable Commissioner of the General Land Office, with the official approval of the honorable Secretary of the Department of the Interior of the United States, did establish and promulgate divers rules and regulations in order to properly and methodically carry out the provisions of the act of Congress approved March 3, 1875, granting the right of way through the public lands of the United States, among which said rules and regulations were and are the following:

"The right under this act to take material from the public lands
69 for the construction of railroads is granted to railroad companies organized according to the provisions of this act and to no other parties. Railroad companies have no power to give general authority to the public to cut timber from the public lands, nor has Congress ever given such authority to the public.

"Individuals controlled and directed by a railroad company or by the contractors of such compauy for building its road, and for whose acts the company is and can be held responsible, will be deemed the agents of the company within the meaning of this act.

"But individuals cutting timber from the public lands and selling the same to a railroad company at an agreed price are not agents of the company. In such a case the railroad company would have no authority to direct the place where or the manner in which the timber should
70 be taken nor, any control whatever over the individuals cutting the timber, nor could it be held in any way responsible for the conduct of such individuals.

"Only those persons, therefore, who are the direct duly authorized agents of a proper railroad company can represent the company in the exercise of the rights granted to such company under this act (the act aforesaid).

"Persons who merely contract to cut and deliver to a railroad company ties or other timber at certain rates per tie or quantity, and for whose acts the company is not responsible, have no authority to take timber from the public lands even for delivery to a railroad company authorized to take such timber by its proper agents; such unauthorized persons will be deemed trespassers on the public lands and must be proceeded against accordingly.

In all instances wherein a railroad company desires to take large
71 quantities of earth, stone, or timber, under the provisions of this act, from any one particular spot or vicinity the proper officers or duly authorized representatives of said company must make application in writing to the Commissioner of the General Land Office, through the register and receiver of the proper land district, specifying under oath the kind of material required, the purpose for which it is desired, the probable amount or quantity needed, and designating the public lands from which the material is to be taken, describing the lands, if surveyed, by section, townships, and ranges, or, if unsurveyed, indicating their locality by reference to some well known point."

That the defendant Daniel Chaplin was not at any time either a member or officer of the Oregon Railway and Navigation Company. That

under the alleged contract and employment he was not, and
72 was not to be, in any degree whatsoever controlled or directed by the said railroad company or by any contractor of such company for building its road, or by any one for whose acts the said company could be held responsible.

That the said Daniel Chaplin was not an authorized agent of the said Oregon Railway and Navigation Company, but was simply a person who merely contracted to cut and deliver to the said railroad company ties and other timber and lumber at certain rates per tie or quantity.

That neither the said railroad company nor any of its officers, nor the said Chaplin, ever at any time made application in writing or otherwise to the honorable Commissioner of the General Land Office, through the register and receiver of any United States land district whatsoever,
73 specifying, under oath or otherwise, the kind of material required, the purpose for which it was desired, the probable amount or quantity needed, and designating the public lands from which the material was to be taken.

That all of said rules and regulations were and are reasonable, and were promulgated before the said Chaplin entered upon the discharge of his alleged contract and employment, and that the said Chaplin had actual notice thereof.

And for a further reply the plaintiff alleges that of the seven million eight hundred and six thousand two hundred feet of boards and other lumber wrongfully converted, as alleged in the complaint, the defendant the Oregon Railway and Navigation Company used and caused to be used four million eight hundred and six thousand two hundred feet thereof, of the aggregate value of sixty-two thousand and ninety-
74 three dollars, in the construction at different points along the line of its said railway, platforms, depots, station houses, freight houses, round houses, water tanks, work shops; and that no part of said four million eight hundred and six thousand two hundred feet of boards and other lumber was used in the construction of the railway of said defendant the said Oregon Railway and Navigation Company, or of any bridges or culverts along the line thereof.

Wherefore the plaintiff prays as in the complaint.

LEWIS L. MCARTHUR,
U. S. Atty.

DISTRICT OF OREGON,
County of Multnomah, ss:

I, Lewis L. McArthur, being sworn upon my oath, say that the foregoing amended reply is true, as I verily believe.

LEWIS L. MCARTHUR.

Subscribed and sworn to before me this 26th day of March, A. D. 1887.

[SEAL.]

KENNETH WILLIAMS,
Notary Public, State of Oregon.

75 DISTRICT OF OREGON, *ss:*

I hereby accept service of this within this 19th day of April, A. D. 1887.

RUFUS MALLORY,
Of Attys. for Defts.

(Endorsed:) Filed April 19, 1887. R. H. Lamson, clerk.

76 And afterwards, to wit, on the 20th day of April, 1887, there was duly filed in said court a demurrer to amended reply in words and figures as follows, to wit:

77 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES, PLAINTIFF,
vs.
DANIEL CHAPLIN AND THE OREGON RAILway and Navigation Company, defendants.

And now come the defendants by their attorneys and demur to the amended reply herein filed, for the reason and upon the ground that it appears upon the face thereof that the matter set up therein is not a sufficient reply to the facts stated in defendants' answer herein.

And defendants specially demur to all the new matter contained in said reply, commencing with the words "and for a further reply" in the 1st line of the 4th page thereof, for the reason that it appears upon the face thereof that such matter is not a sufficient reply to any facts stated in defendants' answer herein.

DOLPH, BELLINGER, MALLORY & SIMON,
Attorneys for Defendants.

78 STATE OF OREGON,
County of Multnomah, ss:

Due service of the within demurrer is hereby accepted, at Portland, Oregon, this 20th day of April, 1888, by receiving a copy thereof, duly certified to as such, by C. A. Dolph, of counsel for defendants.

L. L. MCARTHUR,
Attorney for Plaintiff.

(Endorsed:) Filed April 20, 1887. R. H. Lamson, clerk.

79 And afterwards, to wit, on Monday, the 20th day of August, 1887, the same being the 67th judicial day of the regular April term of said court; present, the honorable Matthew P. Deady, United States district judge, presiding, the following proceedings were had in said case, to wit:

80 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES
vs.
DANIEL CHAPLIN, AND THE OREGON Railway and Navigation Company. } No. 1257. August 29, 1887.

This cause was heard upon the demurrer to the amended reply, and was argued by Mr. Lewis L. McArthur, of counsel for the plaintiff, and by Mr. Cyrus A. Dolph, of counsel for the defendants. On consideration whereof it is ordered that said demurrer be, and the same is hereby, sustained.

81 And afterwards, to wit, on the 29th day of August, 1887, there was duly filed in said court an opinion by the court in words and figures as follows, to wit:

82 United States circuit court, district of Oregon.

Monday, August 29, 1887.

THE UNITED STATES
vs.
DANIEL CHAPLIN AND THE OREGON RAILWAY & NAVIGATION COMPANY.
} Action to recover damages for cutting timber on public lands.

Act granting right of way to railway companies—Construction of.

The act of March 3, 1875 (18 Stat., 482), grants the right of way to certain railway companies over the public lands, and authorizes any of such companies "to take" the material necessary for the construction of its road from the public lands "adjacent" to the line thereof: Held, (1) That the act is a license to the company "to take" the material necessary for the construction of its road without application to or consent of any officer of the Land Department; and that such department has no authority to make any regulations on the subject of such license.
83 (2) If the company takes such material from the public lands not adjacent to the line of its road, or takes more than is permitted by the statute, it is liable to the United States as a wrong-doer. (3) Any person who has a contract with the company to build its road, or any part thereof, or to furnish material therefor, is, without any special agreement to that effect, so far authorized to take the necessary material from the public land the same as said company might do. (4) If a person not in the employment of the company, and having no contract therewith, cuts timber of the land adjacent to the line of its road, and the company acquires the same for the purpose of constructing its road, and so uses it, neither such person or company is liable therefor as a wrong-doer. (5) The license to take material for the construction of the road includes the right to take material for the construction of station buildings, depots, machine-shops, side-tracks, turn-outs, and water stations, and the
84 like. (6) Land is adjacent to the line of the road within the purpose and intent of the act when, by reason of its proximity thereto, it is directly and materilly benefited by the construction thereof.

DEADY, J.

This action is brought by the United States to recover damages for cutting and removing timber from the public lands.

It is alleged in the complaint that on December 18, 1880, and on divers days between then and December 1, 1885, the defendant, Daniel Chaplin, unlawfully entered on sundry sections and subdivisions of sections of the public lands, being parts of townships 1, 2, and 3 north of range 36 east, of township 1 north and 1 south of range 35 east, of township 2 south of range 36 east, and of township 2 south of range 37 east, and situate in the counties of Umatilla and Union, Oregon, and cut therefrom 7,806,200 feet of growing timber and made the same into saw-logs of the
85 value of $2.50 per thousand, and removed the same to divers sawmills on and adjacent to said lands, and there made the same into

lumber of the value of $15 per thousand; that the defendant, The Oregon Railway and Navigation Company, a corporation formed under the laws of Oregon, well knowing the premises, did, between the dates aforesaid wrongfully take possession of said timber and convert the same to its own use, to the damage of the plaintiff in the sum of $117,893.

The answer of the defendants contains a lot of verbose denials, which, in effect, admit the allegations of the complaint, except that the cutting and removal of the timber was unlawful.

It also contains a defense to the effect following: The corporation defendant is formed, among other things, for the purpose of constructing a railway and telegraph from Umatilla, in Umatilla County, "across
86 the Blue Mountains, through the Grand Ronde Valley, in a southeasterly direction to a point on the east boundary line of the State;" that by the act of March 3, 1875, Congress granted to the defendant the right to take from the public lands, adjacent to the line of its road, all timber necessary for the construction of the same; that the road of the defendant was located between Pendleton, Oregon, and the southern boundary of the State, over the townships above mentioned, between September 15, 1880, and June 20, 1881, and completed about November 25, 1884; that within one year from such location a profile map and plat of each section of twenty miles of said road was duly filed with the Secretary of the Interior and approved by him as in said act of Congress provided; that the defendant, being so entitled to take timber from the public lands adjacent to its line of road for the construction thereof, "did contract with *the* employ" the defendant, Chaplin, to cut from said adjacent lands timber to be used for said purpose; that in pursuance of said employment, Chaplin cut from said adjacent lands timber and ties necessary for the construction of said road, and which were actually used therefor, not exceeding three millions of feet, of no greater value than fifty cents per thousand; and the defendant, Chaplin, did not cut or remove from the public lands of the United States, nor did the said company receive from him or convert to its own use, any of such timber, otherwise than as therein stated.

In reply to the answer the plaintiff alleges:

87 (1) On October 19, 1881, the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, promulgated certain rules and regulations concerning the taking of material from the public lands under the act of March 3, 1875, which are set forth, and declare that a railway power has no power to give general authority to the public to cut timber on the public lands; that individuals cutting timber on the public lands and selling the same to a railway company, at an agreed price, are not agents of the company for whom it is responsible, and will be treated as trespassers; but that individuals controlled by a railway company, or the contractors for the construction of its road, and for whose acts the company are responsible, will be deemed the agents of the company.

Then follows a regulation to the effect that whenever a railway company "desires to take large quantities" of material from any particular place, its representative must make application therefor in writing to the Commissioner of the General Land Office, through the register and receiver of the proper district, specifying under oath the kind and probable quantity of material, the purpose for which it is desired, and the particular lands from which it is to be taken.

That Chaplin was not an officer or agent of the O. R. & N. Company, but merely a person who contracted to cut and deliver to said company ties and lumber at certain rates; and that in such employment he was not in any degree controlled by said company, or any contractor thereof, or any
88 onw for whose acts it is responsible; and that neither said company nor Chaplin ever made application for leave to cut any of said timber, as required by said regulation; and,

(2) That of the 7,806,200 feet of lumber wrongfully converted to its own use by the O. R. & N. Company, as alleged in the complaint, 4,806,200 feet, of the value of $62,093, was used in the construction of platforms, depots, station-houses, freight-houses, round-houses, water-tanks, and workshops; and that no part of this latter quantity was used in the construction of the road.

To both these allegations the defendants demur, because the facts stated in either are not a sufficient reply to the defense contained in the answer.

The act of March 3, 1875 (18 Stat., 482), is entitled "An act granting to railroads the right of way through the public lands of the United States."

Section one grants the right of way through the public lands to any railway company organized under the law of any State or Territory, or by Congress, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation and proof of its organization thereunder, "to the extent of 100 feet on each side of the central line of said road."

"Also the right to take from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said road." "Also ground adjacent to such right of way for station-buildings, depots, machine-shops, side-tracks, turn-outs, and
89 water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of the road."

Section 4 of the act provides that any railway company desiring to receive the benefit of the act must, within twelve months after the location of any section of twenty miles of its road, on surveyed land, or otherwise within twelve months after the survey is made, "file with the register of the land office for the district where such land is located a profile of its road," which, being approved by the Secretary of the Interior, shall be noted on the plats of said office, and thereafter all lands over which such right of way passes shall be disposed of subject thereto, but if any such section is not completed within five years from the location thereof, the rights hereby granted shall be so far forfeited.

And now, had the Commissioner of the General Land Office the power to make the regulations in question, or, in other words, to hamper and restrain the company in the assertion of its rights under the act, as therein provided?

After a careful consideration of the matter I am satisfied the regulations are altogether unauthorized. Where they coincide with the act they are superfluous, and when they do not, or go beyond it, they are invalid.

The act makes no provision for an application by a railway company to the Land Department for the appropriation of particular or any material for the construction of its road, or permission to use the same on
90 the concession of any officer thereof when in his judgment it may be proper to do so.

On the contrary, the act is an outright grant or license to the company complying with section 4 thereof "to take" the material, subject only to two conditions—that it is "adjacent" to the line of its road and "necessary" for its construction. And whether any particular material is so "adjacent" or "necessary," the company must determine at its peril, subject to the liability of an action for damages if it should err therein. Nor is it in the power of the Land Department to license or permit the use of any material on the public lands so as to relieve the company from liability therefor in case the same is found not to be within the purview of the act.

In short, the act gives the Land Department no power or authority in the premises. It can neither say how much or what material may be used in the construction of a road. The act is the measure of the company's rights in the premises, and when it has complied with the preliminary condition mentioned in section 4 it has the authority "to take" what under the circumstances may be said to belong to it, and no more.

Of course the act does not authorize any one to take material from the public lands except the railway company. But when we consider the nature of the license and the condition and circumstances of the licensee,
it must be conceded that Congress could not have contemplated
91 that a railway company would in all, or even many, cases select and take this material, so to speak, in person.

Usually railways are constructed either by contract for the entire work or for the several parts involved therein; as, for instance, grading, furnishing ties, laying track, building bridges and the like. Now, whoever contracts with a company entitled to take material from the public lands under this act, to grade the bed of a road, to furnish ties for it, or to build a bridge on it, does thereby, and without any special agreement or authorization to that effect, so far become substituted, in this respect, to the rights of the company. And, in my judgment, even where a person not under contract with or in the employment of the company cuts timber on the public lands adjacent to the line of its road and afterwards disposes of it to the company, to be used in the construction of its road, and it is so used, neither such person nor the company are liable as wrong-doers. The company having a right to take such timber within the area wherein this was cut, and for the purpose for which it was ultimately applied, by receiving it from the hands of such person adopt his act of selecting and cutting it, and make the same its own—ratify it.

Nor is there anything in the general powers conferred on the Commissioner that can be construed to give him authority to prescribe rules for the taking of material, under this act, by railway companies, and particularly to confer on himself the right to determine in advance from
92 where and what quantity of such material may be taken and used.

Section 453 of the Revised Statutes authorizes the Commissioner, under the direction of the Secretary of the Interior, "to perform all executive duties," respecting the public lands; as, for instance, concerning their survey and sale and the issuing of patents; and by section 2478 thereof he is "authorized to enforce and carry into execution by appropriate regulations" every part of title 32 "not otherwise specially provided for."

But these "executive duties" must be prescribed by law before they

can be performed, and there is no law prescribing any duty to be performed by the Land Department concerning the taking of material under the act of 1875. And the regulations which the Commissioner may make to enforce or carry into effect any part of title 32 can only be appropriate, legal, and proper when the statute to be enforced contemplates and admits of such regulation and the matter is not otherwise specially provided for. Nor is the act of 1875 any part of said title, having been passed since the revision of the statutes; and if it was, so far as the mere taking of material is concerned, as to when and where it may be done and to what extent, the statute leaves nothing to be regulated.

Doubtless the Commissioner is authorized and charged with the duty of seeing that a railway company does not abuse this license by taking material from public lands not adjacent to the line of its road, or
93 by taking more from lands that are adjacent thereto than is necessary for the construction thereof. And in the exercise of this general supervision it may be proper and convenient for the company to take the opinion of the Secretary and Commissioner as to what are "adjacent" lands under certain circumstances, and what structures may properly be included in the phrase "construction of its road." By this means unprofitable controversy and litigation between the Government and the company may be avoided.

But in the end the company may, if it will, exercise its own judgment and take any material to which it may consider itself entitled, unless restrained by legal proceedings, subject only to the judgment of the court in which it may be proceeded against for an alleged trespass.

The facts set forth in the first allegation of the reply are immaterial and insufficient to avoid the defense contained in the answer.

The materiality of the second allegation depends on the construction to to be given to the word "railroad," as used in the second clause of section 1 of the act of 1875. The license "to take" material from the public lands is limited to what is necessary for the "construction" of the adjacent road.

Before undertaking to interpret the language of the act in this connection it is proper to consider its general nature and purpose.

And, first, the act is not merely gratuity, but was evidently passed
94 on the theory that it is for the interest of the grantor to promote the building of railways through the public domain. At its passage the United States was, and still is, the owner of millions of acres of wild and unsettled land. Congress intended to *in*hance the value and promote the settlement of th*ese* lands by inducing capital to build railways through them. The inducement is the right of way and the license to take material from the adjacent lands for the construction of the road. And this right of way is not confined to a mere railway, but expressly includes ground not exceeding twenty acres for every ten miles of the road for station buildings, depots, machine shops, side tracks, turnouts, and water stations.

From this it appears that in making the grant of the right of way Congress appears to have considered all these structures as a necessary part of the road and provided for them accordingly. In construing the license to take material for the construction of the road heed should be given to what Congress, in the grant of the right of way, assumed would be in-

cluded in such construction. The grant of the easement over the land for the construction of the road indicates the extent of the license to take material for its construction. The one is the complement or measure of the other.

The license "to take" material is manifestly intended to aid the company to build and construct that for which the right of way was given, and nothing appearing to the contrary it ought to be construed so as to include the structures specified in the latter as well as in the mere track.

95 But I think there is no difficulty in reaching the same conclusion on general principles. In common parlance, a railway consists of "the road" and "the rolling stock." The former includes everything that is immovable or affixed to the soil—such as station-houses, round-houses, platforms, water-tanks, and machine-shops. The road can not be operated without these or considered constructed until they are build.

And under peculiar circumstances other structures or uses of material may be "necessary" in the construction of a road. A ferry-boat is a floating bridge, and a snow-shed is a tunnel through a temporary but periodic snow bank. The one is as much a part of the track as a stationary bridge, and the other as a tunnel through a permanent bank of earth or stone. Both may be necessary in the construction of a road, and without which it could not be successfully operated.

Under any circumstances it would be a narrow construction of such license to limit it to the material necessary for the construction of the mere track, but when we consider how much the construction of this road has benefited the United States; that it has opened the country through which it passes to settlement, and greatly enhanced the value of the adjacent lands, such construction savors of downright meanness.

The material appears to have been taken from certain townships through which the road runs, and no question is made but that such lands are "adjacent" to the line of the road.

96 What is "adjacent" land within the meaning of the statute must depend on the circumstances of each particular case. Where the "adjacent" ends and the non-adjacent begins may be difficult to determine.

On the theory that the material is taken on account of the benefit resulting to the land from the construction of the road, my impression is that the term "adjacent" ought not to be construed to include any lands save such as by its proximity to the line of the road is directly and materially benefited by its construction.

The demurrer is sustained.

Mr. Lewis L. McArthur, for the U. S.

Mr. Cyrus A. Dolph, for the defendants.

(Signed) MATTHEW P. DEADY,
U. S. District Judge, Oregon.

(Endorsed:) Filed Aug. 29, 1887. R. H. Lamson, clerk.

97 And afterwards, to wit, on the 10th day of April, 1888, there was duly filed in said court a petition for substitution of administrator of Chaplin, as defendant, in words and figures as follows, to wit:

98 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES
vs.
DANIEL CHAPLIN AND THE OREGON RAILWAY and Navigation Company. } No. 1257.

The petition of Lewis L. McArthur, U. S. attorney for the district of Oregon, respectfully shows the court:

I. That on the 14th day of July, 1886, the United States commenced an action at law in this court against Daniel Chaplin and the Oregon Railway and Navigation Company for the recovery of $117,093.00 damages for the conversion by said Daniel Chaplin and said Oregon Railway Company of seven million eight hundred and six thousand and two hundred feet of boards and other lumber belonging to the United States.

II. That said action is still pending and undetermined.

III. That the defendant, Daniel Chaplin, as your petitioner is in-
99 formed and believes, did depart this life on the 9th day of December, A. D. 1887.

IV. That at the time of his death the said defendant, Daniel Chaplin, was a resident and inhabitant of Union County, Oregon.

V. That on the 14th day of January, A. D. 1888, such proceedings were had in the county court of the County of Union, State of Oregon; that R. E. Bryan was then and there duly appointed administrator of the estate of the said Daniel Chaplin, deceased, and letters of administration upon said estate were then and there duly issued to the said R. E. Bryan.

VI. That said R. E. Bryan immediately thereafter entered upon the performance of the said trust, and is at this time administrator of said estate aforesaid.

Wherefore your petitioner prays that the said R. E. Bryan, administrator of the estate of Daniel Chaplin, deceased, may be substituted as defendant instead of Daniel Chaplin, deceased. And your petitioner will ever pray.

LEWIS L. MCARTHUR,
U. S. Attorney.

100 DISTRICT OF OREGON, *ss:*

I, Lewis L. McArthur, being sworn, depose and say that the foregoing petition is true, as I verily believe.

LEWIS L. MCARTHUR.

Subscribed and sworn to before me this April 9, 1888.

R. H. LAMSON,
Clerk.

(Endorsed:) Filed April 10, 1888. R. H. Lamson, clerk.

101 And afterwards, to wit, on the 10th day of April, 1888, there was duly filed in said court a motion to substitute administrator as defendant, in words and figures as follows, to wit:

102 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES
vs.
DANIEL CHAPLIN AND THE OREGON RAILWAY and Navigation Company. } No. 1257.

Comes now the plaintiff, by Lewis L. McArthur, the attorney thereof for the district of Oregon, and moves the court to make an order substituting E. R. Bryan as one of the defendants in the above-entitled case instead of Daniel Chaplin, deceased, and bases this motion upon the verified petition duly filed.

LEWIS L. MCARTHUR,
U. S. Att'y.

(Endorsed:) Filed April 10, 1888. R. H. Lamson, Clerk.

103 And afterwards, to wit, on Tuesday, the 10th day of April, 1888, the same being the 2d judicial day of the regular April term of said court—present, the honorable Matthew P. Deady, United States district judge, presiding the following proceedings were had in said case, to wit:

104 [2, Tues.

In the circuit court of the United States for the district of Oregon.

THE UNITED STATES
vs.
DANIEL CHAPLIN AND THE OREGON RAILWAY and Navigation Company. } No. 1257. April 10, 1888.

Now, at this day, comes the plaintiff, by Mr. Lewis L. McArthur, United States attorney for the district of Oregon, and by his verified petition shows to the court that the defendant Daniel Chaplin has died since this cause was begun; that his death occur'ed on December 9, 1887; and that letters of administration upon the estate of said Daniel Chaplin, deceased, were on January 14, 1888, duly issued to R. E. Bryan, by the county court of the State of Oregon, for the county of Union, and that he was duly qualified to act as such administrator: Whereupon, it is ordered that said R. E. Bryan, administrator as aforesaid, be, and he is hereby,
105 substituted as defendant instead of said Daniel Chaplin, deceased; and it is further ordered, that a duly-certified copy of this order be forthwith served upon said R. E. Bryan, administrator aforesaid.

106 And afterwards, to wit, on the 18th day of April, 1888, there was duly filed in said court a certificate of marshal of service of order in words and figures as follows, to wit:

107 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES
vs.
DANIEL CHAPLIN AND THE OREGON RAILWAY and Navigation Company. } No. 1257.

DISTRICT OF OREGON, *ss:*

I certify that on the 14th day of April, 1888, at La Grand, Union County, in said district, I duly served upon R. E. Bryan, administrator of Daniel Chaplin, deceased, a copy of the order of court substituting him as defendant in the place of Daniel Chaplin, deceased, by delivering to him personally a true copy of said order, duly certified to by the clerk of the U. S. circuit court for Oregon.

JOHN MYERS,
U. S. Marshal,
By H. C. MYERS,
Deputy.

(Endorsed:) Filed Apr. 18, 1888. R. H. Lamson, clerk.

108 And afterwards, to wit, on Friday, the 18th day of May, 1888, the same being the 21st judicial day of the regular April term of said court: Present, the honorable Matthew P. Deady, United States district judge, presiding, the following proceedings were had in said case, to wit:

109 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES
vs.
R. E. BRYAN, ADMINISTRATOR OF THE ESTATE of Daniel Chaplin, deceased, and the Oregon Railway and Navigation Company. } No. 1257, May 18, 1888.

Now, at this day comes the plaintiff in the above-entitled cause by Mr. Lewis L. McArthur, United States attorney, and the defendants by Mr. Cyrus A. Dolph, of counsel; and thereupon said defendants move the court for judgment herein upon the pleadings; and it appearing to the court that the demurrer of the defendants to the amended reply herein was heretofore sustained, and said plaintiff declining to further plead, but electing to stand upon its said amended reply: It is therefore considered that said plaintiff ought not to have or maintain this action, and that the defendants go hence without day.

110 UNITED STATES OF AMERICA,
District of Oregon, ss:

I, R. H. Lamson, clerk of the circuit court of the United States for the district of Oregon, do hereby certify that the foregoing is a true copy of

the record and of all proceedings, including the opinion of the court in the case of The United States *vs.* R. E. Bryan, administrater of the estate of Daniel Chaplin, deceased, and the Oregon Railway and Navigation Company, defendants, in said circuit court determined.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said circuit court, at Portland, in said district, this June 5, 1888.

[SEAL.]

R. H. LAMSON,
Clerk,
By R. B. LAMSON,
Deputy Clerk.

(Indorsement on cover:) Oregon, C. C. U. S. No. 1025. The United States, plaintiff in error, vs. R. E. Bryan, administrator of the estate of Daniel Chaplin, deceased, and the Oregon Railway and Navigation Company. Filed June 21, 1888.